I got the impression as he read it that he set that provision in his own mind, to cover the compensation to be paid to the members of the Committee for work they might do; and I should think it might not be a large enough total.

Mr. Dodge's motion, as I understood it, carried the thought that we felt he should be compensated at the rate of $5000 a year.

MR. DODGE: Yes, I think it was embodied in the motion that it be fixed in accordance with the standards of the American Law Institute.

MR. LEMANN: Is that the right figure?

MR. WICKERSHAM: Yes, 5000 a year.

MR. LEMANN: So I suppose we would have to leave it rather open.

THE CHAIRMAN: Is that at the rate of 5000 a year for the time spent?

MR. WICKERSHAM: At the rate of 5000 a year.

THE CHAIRMAN: For the time spent, you mean?

MR. WICKERSHAM: No, no. A Reporter is designated

as a Reporter of, say, Courts, at a salary of $5000 a year.

MR. LOFTIN: Mr. Chairman, I suggest that the item of $5000 be made $10,000.

MR. DOBIE: You mean Dean Clark's salary as Reporter?

MR. LOFTIN: No, he had $5000 there for special work by members of the Committee, which did not include any salary for Dean Clark at the time the budget was made up.

Now, if the salary of the Reporter is at the rate of $5000 a year under the standards of the American Law Institute, it seems to me we should add $5000.

MR. WICKERSHAM: I agree with you in principle; but shouldn't we fix the salary of the Reporter separately, and then give him an additional $5000 for that?

MR. LOFTIN: I have no objection as to how it is done.

MR. WICKERSHAM: I agree with you in principle.

MR. LOFTIN: All right.

I make a motion, then, that the salary of the Reporter be fixed at $5000 a year, and included in the budget at that figure.

MR. WICKERSHAM: I second the motion.

THE CHAIRMAN: Is there any discussion?

All in favor say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

THE CHAIRMAN: Then do you want to have another resolution, approving this budget as drawn?

MR. WICKERSHAM: Yes.

MR. LEMANN: With the leave that you suggested, to make changes?

MR. DOBIE: That it be altered as emergencies arise, with the consent of you and the Chief Justice?

THE CHAIRMAN: On that resolution, is there any second?

MR. LOFTIN: I second it.

THE CHAIRMAN: All in favor of that say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. CLARK: Mr. Chairman, I thank you all, but I take it that you are going to discuss this with the Chief Justice. If any of these arrangements --

MR. DOBIE: No expenditures can be made, except by his approval.

THE CHAIRMAN: All our acts are advisory.

I have three or four other points --

MR. OLNEY: Before we leave that, shouldn't we authorize the Reporter to employ such other repertorial assistance as he needs? Shouldn't there be a specific resolution, so that he can get under way.

MR. LEMANN: Isn't that all in this budget?

THE CHAIRMAN: I think that is all listed here.

MR. OLNEY: It is in the budget, but I thought it was possibly necessary to give him specific authority to engage these people.

THE CHAIRMAN: That, we will have to get from the Chief Justice. This is the general lay-out, as we recommend it to the Court. When he comes to employ anybody, he has got to send in his name, profession, salary and everything, and get an order from the Chief Justice.

MR. OLNEY: There is a little difference between adopting a budget and authorizing the Reporter to employ the men when he gets the budget approved; that is the only thought I had.

MR. LOFTIN: I think, Judge, probably what you had in mind was that the Reporter should have authority to employ assistants, subject to the approval of the Chief Justice?

MR. OLNEY: I want to make it specific.

MR. LOFTIN: If you will make that motion, I will second it.

MR. OLNEY: Thatis my motion.

THE CHAIRMAN: What is your pleasure about that? Any discussion?

All in favor of that say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. CLARK: Mr. Chairman, should I report to you or Major Tolman or the Chief, or what machinery shall we have? Shouldn't I make all recommendations to you?

MR. WICKERSHAM: Yes, I think so. The point of contact is between the Chairman and the Chief Justice.

MR. CLARK: Yes, I think so.

THE CHAIRMAN: There are two or three other problems I would like to get off my chest and then I am through, so far as my agenda is concerned.

There are three questions that have arisen under this statute, about which there seems to be a different opinion among some of our members, the law school members, and I have had some correspondence with Mr, Sunderland.

I am sorry Mr. Sunderland isn't here. He is a distinguished man in this field, and has had some experience in it. He couldn't come, because he is teaching in the South; I asked him to send in writing any suggestions he had to make as to the scope of the work, and he sent me a copy of an address he has recently delivered in the South on

this very subject, to the Judicial Conference of the Fourth Circuit at Asheville. He has reiterated in that speech some of his views about the scope of the work, more particularly, as controlled by the terms of the statute, which this Committee ought to consider.

The first one is this:

The statute, Section 1, reads:

"That the Supreme Court of the United States shall have the power to prescribe, by general rules for the District Courts of the United States and for the Courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure, in civil actions at law. They shall take effect six months after their promulgation."

Then comes the second section, which he quotes:

Mr. Sunderland takes the view that the words "General Rules" do not mean that the rules that we make shall be uniform in all the Districts. He says it is a general rule if you pass a rule that says, "Each District shall have its own rules, in conformity with the local court rules, or the State rules."

I have had some correspondence with him about that, and my position was that "general rules" meant general in the sense of being uniform in all the Districts. To the extent that we adopt rules, they should be uniform in all Districts.

Of course, we can stop short and cover certain fields, and then tack a clause on at the end that, in the points not covered by the rules, they shall conform to the local practice; but I will confess that I was rather taken aback at the suggestion.

Mr. Sunderland goes back to the resolutions passed by the American Bar Association, which he says fortify his position. But those resolutions, while they are directed at conformity, are based on the theory that if a uniform general system is adopted in the Federal Courts, and is good, that the State authorities may follow it, and in that way bring about uniformity.

We have that problem, so I would like the Committee to consider that point.

I reported at one time to the Chief Justice, the fact that that question had arisen. I sent him a copy of my letter to Mr. Sunderland, in which I took the view that a general rule meant a rule

uniform in all the districts; and that one of the principal objections that had been urged to changes in the rules is that they will be uniform and will destroy conformity, and how can a set of rules be a model for the States if you have as many different sets as you have Districts?

Of course, I am stating the extreme result of his position, but in his address to the Judicial Conference he stated his position again about that.

He says:

(Reading.)

He reaches the conclusion, therefore, that the rules we adopt need not be uniform in all Districts, but can vary, District by District, according to the local practice, with the idea of getting conformity.

Now, that question, we ought to take right up and put ourselves on record and say what we think about it, because the Reporter has to know right away whether we are going to have a uniform set of rules or not.

MR. DONWORTH: Mr. Chairman, the second section of the Act says:

> "The Court may at any time unite general rules prescribed by it for cases in equity with those prescribed in law actions, so as to secure one form of civil action and procedure in both."

We all know how general the general rules in equity are, of course. However, where there are some things unprovided for, the local court makes its own rule; but I see no escape here from the conclusion that the expression "General Rules" means to provide for a new method of procedure, the same as that expression has meant in the equity cases.

My thought would be that it is rather obvious -- in fact, I am surprised to think the language is open to the opposite construction.

MR. CLARK: Mr. Chairman, I might say Judge Donworth, I think, states the complete answer, and it is the one I should have made, and I think it can be backed up by the history.

I want to say first however, I am not quite sure how far Mr. Sunderland will go. I am not sure we are so very far apart, if at all. It is a little unfortunate that he isn't here today and we can't discuss it.

I might say, in this address he made at Asheville, I find he does suggest certain things that should be taken care of locally, and I think I would agree -- one in particular is this matter of Arrest and so on. My own view is that we can well adopt the State rule as it now exists --

MR. WICKERSHAM: Just leave it to the States.

MR. CLARK: Yes, but that means there is still a drafting problem on how to adopt them. But this is what Mr. Sunderland said, after stating there should be some use of the local rules:

(Reading.)

So, as I say, I am not sure, after all, how far we are apart.

I shouldn't have stated the history as he does. He emphasizes the desire of the American Bar to secure conformity by providing a model which the States will follow. Well, that has been stated, but I think it was not expected that the Federal system here devised would be more than a model which it would be hoped the States would adopt.

Furthermore, there is a bit of history he has not emphasized, which I think is very important, and that is as to how the second provision came into the Act.

That came into the Act directly after a very forceful address of Chief Justice Taft to the American Bar Association, urging that it be done; urging, in fact, that a unified procedure be adopted; and I think that supersedes anything Mr. Shelton may have said in 1910.

In 1922, Chief Justice Taft, at the time of the consideration of the leading case of Liberty Oil Company, where the Chief Justice went far in providing for consideration of the steps toward unified procedure, urged that the complete step be taken. When you consider that history, and

the use in the second section of the provision for the united procedure -- a term which has come to have a well-recognized significance in American law, referring to the united procedure originally adopted in the Field Code, and in the other States, it seems to me the complete basis is given.

MR. WICKERSHAM: Isn't that what the Chief Justice expressed in his address before the Law Institute last May?

MR. CLARK: Yes, and I think the Chief Justice answered the question.

It seems to me Mr. Sunderland again states the question he has stated before as to the difference in wording of the two sections; but you will notice Mr. Meacham, in his article, all he does is to re-state it. I should have supposed it didn't require re-statement; that the Chief Justice had answered it. But, having re-stated it, he doesn't specifically urge a construction contrary to the one the Chief Justice made. He simply says that may be the problem, and if there is a difference, a certain course needs to be followed, but he states no different or other course which may be followed.

So that I am not sure but what we have been ascribing to Professor Sunderland more views than he really has; and the section I just read, on what he thinks is the scope of the Committee, would help a great deal.

THE CHAIRMAN: Well, maybe you are right, but this speech of his was delivered after I had had my exchange of correspondence with him on the subject; so he had it perfectly clear in mind when he made it, that we are now having a unified set of rules for both law and equity; and he also had in mind specifically of whether our rules, insofar as we cover the subject, had to be uniform.

Of course, anybody could see there is nothing in the statute that compels the Supreme Court to cover every conceivable field of pleading, practice and procedure. They can cover so much of the field as they like; and where they do not cover it, it is easy to see that local conformity, under the Conformity Act, or otherwise, can prevail.

But, the specific question we have to decide is whether, insofar as we do adopt rules, this Committee or the Court has got any power to make a set of rules that do not apply with equal force in each District.

MR. GAMBLE: Mr. Chairman, in that connection I think we can get a good deal of help from the debates in Congress at the time of the passage of this bill, both in the Senate and the House.

Someone has furnished me with a transcript of those debates, and I think it is quite clear from this transcript that it was in the minds of both Houses that whatever rules were prescribed should be uniform in each district.

MR. DOBIE: It would seem to me it would be extremely unfortunate if we said, for instance, that the bill of discovery should be proper in the First, Third and Seventh Circuits, but should not be used in the Second, Fourth, Sixth, Eighth and Tenth. To me, I think that would be absolutely unfortunate, and not contemplated by the Act at all.

In other words, if we prescribe a rule, we are not going to make a rule to apply to one Circuit, and not to another.

MR. WICKERSHAM: Isn't a very splendid precedent furnished by the equity rules?

MR. DOBIE: I think so.

MR. WICKERSHAM: Your suggestion is that we can

propose rules which can conform the practice at common law with that in equity; and the equity rules which have been in force for many years are general rules, applicable, so far as they apply to procedure in the Federal Courts, throughout the United States.

MR. DOBIE: The same thing is true in Admiralty. You can't proceed one way in Admiralty in Portland, and another way in Seattle.

MR. DODGE: Mr. Mitchell, did you send your correspondence with Mr. Sunderland to the Chief Justice?

THE CHAIRMAN: Yes, I wrote this letter to Sunderland, and it went to the Chief. It went to the Court. He told me that the letter was read in conference in the Supreme Court.

This is what the Court had before it. I didn't ask the Chief Justice specifically whether he agreed with me or not, but I saw him afterward about it, and my inference was that not only he, but the Court itself, was in entire accord with the view I had expressed in this letter on this point, and two others which we will take up later.

I would hardly feel justified in saying I was told specifically that the Court ruled that way on it. And after Mr. Sunderland made his speech, I was sorry that I hadn't asked the Chief point blank.

This is what I said about it, and this is what the Court had before it.

The first point in Sunderland's article or report to the local committee in Ohio is the subject of conformity between State and Federal practice.

(Reading.)

That is the letter I sent to the Chief Justice, and after it had been submitted to the Court, I had a conference with him. We just referred generally to this subject, and I inferred from what he said there that they were in entire accord with that view.

MR. WICKERSHAM: It seems to me that is the correct interpretation of that statute, and meets the purposes of the statute. I think the purpose of that statute was quite clear, and it would be a perversion of it to suggest a set of rules which would be applicable in some districts and not in others.

MR. GAMBLE: Mr. Chairman, would it be in order to make a motion that, in the preparation of these rules, we proceed upon the basis that they shall be made uniform in all districts?

If so, I will be glad to make that motion.

THE CHAIRMAN: You mean by that, insofar as we adopt rules, they shall be uniform?

MR. GAMBLE: Yes, sir.

THE CHAIRMAN: Leaving open the idea that where we stop short and don't cover a field by rules, that

then the conformity features may enter into it?

MR. GAMBLE: Yes, that is what I mean.

MR. CLARK: Mr. Chairman, I think that is all right; certainly the purport of it is quite my idea; that is, that what we are after is uniformity. Would that exclude decisions such as Mr. Wickersham has suggested, and that I tentatively agree with?

MR. WICKERSHAM: We wouldn't cover those.

MR. GAMBLE: I don't mean it to cover those.

MR. WICKERSHAM: No, he doesn't mean to cover those. Insofar as we do adopt a rule, that it be general in its application; but if, for instance, we decide it is inexpedient to adopt rules on provisional remedies, covering certain fields like the granting of attachments --

MR. CLARK: That would stillpermit us to adopt a rule saying the State rule would apply?

MR. WICKERSHAM: The conformity statute covers it.

MR. GAMBLE: No, I think the Conformity statute is probably repealed.

THE CHAIRMAN: Our draft will probably wind up

with a statement at the tag end of it to the effect that, insofar as any matters are not covered by these rules, under the Conformity laws, the practice under local rules will be followed.

MR. WICKERSHAM: Yes, that is your idea on it?

MR. CLARK: Yes.

MR. LOFTIN: That is the motion, then?

MR. GAMBLE: Yes, that is what I intended.

MR. DONWORTH: This discussion overlooks a motion that was adopted a while ago about an invitation to the existing committees.

You will recall that those committees were appointed entirely under Section 1, and they were not requested to present anything along the lines of unification of law and equity. In fact, there was some discussion in the State Bar Association in Washington as to whether those committees had any function any longer, because, to prepare a set of rules in purely law actions would not coincide with the work of this Committee.

I do not think this suggestion I am now making calls for any reconsideration at all, but I think we must bear that in mind; that what we

get from those committees will be only along the line of material that we will draft into our uniform rules.

THE CHAIRMAN: Well, they will be told that we are headed for a unified system.

Is there any further discussion of the resolution about what the general rules mean?

MR. WICKERSHAM: Question.

THE CHAIRMAN: All in favor of that resolution say "aye".

Opposed?

(The resolution was carried, by the unanimous vote of the Committee.)

THE CHAIRMAN: I will make this statement at this time: Of course, every action of this kind that we take will be summarized and reported to the Chief Justice. We are in the perfectly gorgeous position of having a boss to tell us whether we are right or not, and who is going to have the last word on questions of Constitutional and statutory construction. No Congress has ever had that beautiful position. If we report a thing this way, and we get no kick back from the Court, or they say, "Go anead," we can be perfectly free of all doubt as to whetner we have misconstrued the law or our function or anything else. I never was in a position that I enjoyed as much as that, before.

MR. WICKERSHAM: That is the great advantage of being advisory, merely.

THE CHAIRMAN: Yes. Now, the next point I would like to bring up, if you will permit me, is another point that Mr. Sunderland has raised and insisted on. It, in turn, was the subject of a letter to him, copy of which went to the Court.

He says that Section 1 of this Act says that these rules, the common law rules shall take effect within six months after their promulga-

tion and thereafter all laws in conflict therewith shall be of no further force and effect.

Now, he says when you come to Section 2, you don't find any expressed statement in that that the unified rules shall supersede all laws in conflict therewith.

Therefore, his conclusion is that if we adopt a unified set of rules, that insofar as they relate to common law actions, they are free from statutory restrictions; but insofar as they relate to equity actions, they are tied hand and foot.

MR. WICKERSHAM: Oh, no.

THE CHAIRMAN Now, he has again made that point in his address down there; and that also went to the Court, in this form:

(Reading.)

THE CHAIRMAN: That went to the Court, as well as to the Chief, and I never heard anything to the effect that they didn't agree with that.

MR. DOBIE: I move, Mr. Chairman, that we proceed on that assumption.

MR. CLARK: Mr. Chairman, I wholly agree with your view, and I disagree with Mr. Sunderland. If you don't mind, I think we ought to add one thing more as a part of his argument, so that we have it before us.

I have in mind the earlier provisions of the statute conferring the equity rule-making power. This was a part of his argument: That the earlier grant of power to make rules in the equity court was as follows: This is in the 28 U.S.C.A., Section 730:

> "The Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with the laws of the United States -_"

Now, he says, and I suppose is quite correct on that, that therefore the equity rules incorporated various statutes. Now, his argument is that under the new rules, Section 1 provides as to the law

rules, that they shall repeal the things which are inconsistent. Nothing is said about the equity rules, so his idea is, when you put the two together, you have the equity rules with this limitation, and the law rules without any limitation.

I think that is his argument, and I think we had better have it before us.

MR. LEMANN: It is a good technical argument, but the result seems to me to defeat the argument.

MR. CLARK: I think that is the answer. Probably, as I suggested, it was answered by Chief Justice Taft in bringing up the question of unified procedure. "Unified procedure" is a well recognized thing in this country. When they speak of that, they mean something different than the other equity rules.

THE CHAIRMAN: It strikes me that it is just because the Court might make any rules in equity different than the statute, that Congress wanted to have the chance to take a shot at it; that is why they reserved the power of veto.

MR. CLARK: Of course, I agree entirely with that interpretation, but I didn't want Mr. Sunderland to

think we hadn't tried to get his point as fully as we could.

MR. WICKERSHAM: Well, the motion has been made that we proceed on the other theory.

THE CHAIRMAN: Here again, we have the assurance that if we so report it to the Court, we will be checked on.

MR. WICKERSHAM: Yes, I think so.

THE CHAIRMAN: Is there any further discussion of that point?

All in favor of the resolution say "aye".

Opposed?

(The resolution was carried by the unanimous vote of the Committee.)

THE CHAIRMAN: Now, I have just one other thing -- do you want to adjourn for lunch?

MR. WICKERSHAM: It isn't one o'clock yet.

THE CHAIRMAN: All right. Here is another point, and that is whether or not the statute gives the Court power to deal with the rules of evidence under the head of procedure and practice; and whether, if it does, it is expedient to deal with them.

I find that most of our law school friends are itching to get their hands on Evidence, because they think they need a uniform system, and they want to tackle it, and they have made some very powerful presentations which I have seen, of the need for it.

My feeling about that has been that it is a case of the wish being father to the thought, and that a statute such as this, which talks about pleadings, practice and procedure, wasn't intended to authorize the Court to re-write the laws of evidence.

You can make arguments that, in a sense, rules of evidence are matters of procedure rather than substantive law; but I think Dean Clark has some ideas about that.

I will just read here what I said to the Chief Justice on that point, in this same letter to Mr. Sunderland, who has that view quite strongly; then we would like to hear from Dean Clark about it:

(Reading.)

THE CHAIRMAN: That is what I said in that letter.

MR. LOFTIN: May I ask, Mr. Chairman, did you get any reaction?

THE CHAIRMAN: The same as the others; that is, a pleasant smile, and the assurance that the Court had read the letter and they were pleased with the way we were going at things; something to that effect. I never asked him point blank.

MR. LOFTIN: No objection, at least?

THE CHAIRMAN: None at all.

MR. CLARK: Mr. Chairman, this point is one of a great deal of importance, I think; and there is another point of a similar nature that has caused me a great deal of trouble, and that is the matter of courts of review.

THE CHAIRMAN: I have got that under a separate heading, here.

MR. CLARK: Yes. The two are not identical, except that conceivably the philosophy we apply to our decision in one case might apply to the other.

My view, shortly stated, is this:

First, that there is a great necessity of doing something in both those fields, evidence and appellate review. Second, the matter is certainly -- I can't say clear; it is doubtful -- under the Act, I can't say there is authority, but I think some argument can be made.

In the matter of appellate review, in particular, if we continue the present system of two forms of review in equity and law -- review of all the facts in equity, and review of only questions of law on the law side -- you present an element which will be reflected back into the trial courts, and will tend to preserve the old distinction between law and equity.

That is the great difficulty there. It will inhibit a good deal the tendency to a uniform system; so that I really think that question is perhaps more important than the evidence question. The evidence one is perhaps a little more apart. Nevertheless, the evidence situation has been quite unfortunate. I think I may quote the leading authority on the subject; that is, Dobie on Federal Procedure:

(Reading.)

MR. WICKERSHAM: Why does he limit it to Federal Courts? I agree with his remarks, if they are extended to all courts.

MR. DOBIE: I was writing only of the Federal Courts.

MR. WICKERSHAM: You don't limit it to those?

MR. DOBIE: No, sir, I do not; but at that time, in that book, I was writing only on the Federal Courts.

MR. CLARK: Now, on the criminal side of the Federal Courts, with which we don't touch, of course, but where there is a good deal of analogy, the Court has done a great deal. They started out in 1851, in United States vs. Reed, to try to apply the law of evidence of 1789. That didn't work, so the recent decisions -- particularly, in the Wolf case, they come pretty close to establishing a fairly up-to-date and uniform system. Now, I may be a little too hopeful, but I think the tendency is that way, by judicial decisions on the criminal side.

On the law side, they are supposed to be following the conformity system now, but as only a part of the "hodge-podge of evidence rule in the

Federal Courts," we now have some vestiges of the three systems, criminal, equity and law.

If we are setting out to make a model of procedure which will be uniform, and we can't cover this, it is unfortunate.

THE CHAIRMAN: You draw a distinction between the methods of taking testimony?

MR. WICKERSHAM: That is different.

MR. CLARK: Oh, I wanted to bring that out. Now, is there a difference? If you hold the method of taking testimony is a matter of practice --

MR. WICKERSHAM: Isn't there a distinct difference between the rules of evidence and procedure in taking testimony, or the different things that may be offered in evidence?

You have got a whole body of statute law, for instance, regarding the things that may be used in evidence, how they must be authenticated, and so on.

MR. CLARK: You can make a brief either way, by citing certain precedents.

MR. WICKERSHAM: You can. There is a great deal

of loose thought on the subject.

MR. CLARK: I have had this question raised as to rules of discovery: Are rules of discovery procedural, or evidence? Specifically, it has been suggested by a good many -- Professor Sunderland suggested in his address that we ought to have modern rules of discovery. It is a matter he has worked on a great deal. Is that within our power?

THE CHAIRMAN: That has nothing to do with the rules of evidence, as to the admissibility, the competency of witnesses, and so on. It deals with the procedure in obtaining evidence.

MR. CLARK: I should like very much, myself, to hear from the leading authority on the subject.

MR. DOBIE: I don't like to be referred to like that. I am really very dubious about that point, and I would like to hear discussion. I think there is a good deal in what you say.

For example, the "fishing" deposition, we may deal with that; or the methods of taking testimony, of course, I think we will have to deal with, references to Masters, and things of that kind.

But when you go to the whole question of

the competency of witnesses and the admissibility of testimony, if we go into that, we have got to draw practically a complete Code of Evidence. That is going to be extremely difficult.

I would like very much to hear from Professor Sunderland on that point, as to whether he definitely thinks we ought to do that whole thing, or not.

MR. CLARK: I tell you he does.

THE CHAIRMAN: I have got his word on that.

MR. DODGE: Is there any code of rules in this country or in England that undertakes to deal with the rules of evidence?

MR. OLNEY: Oh, yes, under the code rules, they do in some places.

MR. DODGE: Those are statutory codes?

MR. OLNEY: They are statutory codes. They are not put out as a code of procedure, necessarily, but they are statutory codes of evidence.

MR. WICKERSHAM: Yes, but those are statutory codes of evidence, Judge, aren't they, as distinguished from rules of procedure?

MR. OLNEY: Yes.

MR. CLARK: In the original Field Code, there are many provisions relating to evidence. Of course, they did not undertake to cover the whole field of evidence, but there are lots of statutes on evidence.

MR. WICKERSHAM: Well, I have a memorandum of the numbers of sections in the Federal Judicial Code that deal with evidence; there are a large number of sections, but it is almost all providing modes of taking evidence, either by deposition or by witnesses, books and writings that may be produced, and a few things like Section 638, for instance, that any admitted handwriting of a person may be used for comparison, and so on.

In other words, Congress hasn't been entirely logical in that, but there are a whole lot of statutory provisions which regulate the procedure; and then there are a number of statutory provisions which deal with the things that may be offered and must be received in evidence, how they must be authenticated, and so on.

MR. CLARK: I might say that I don't think it will be so much of a job if we start on it as

suggested, because my conception of dealing with the law of evidence is mostly to say there shall be none. That isn't quite the way I would put it, but I would think there should be fairly free admissibility.

THE CHAIRMAN: What do you think would be the reaction of the Bar? Mr. Hammond --

MR. WICKERSHAM: There would be a howl from the Atlantic to the Pacific.

MR. HAMMOND: Just on the question of whether there are any acts on evidence, there is the India Code, supposed to be about 1870. I know about that. I thought I would mention that.

MR. CLARK: Did you people consider somewhat the question of extending the rules?

MR. HAMMOND: We have thought about that evidence question considerably.

MR. DOLGE: I would like to have your reaction, Mr. Hammond.

MR. HAMMOND: Well, I don't know as we came to any conclusion in the matter. The term "procedure" is probably broad enough to include evidence, and there was a decision of the Supreme Court which so held --

I have forgotten the name of it --

MR. CLARK: Yes. Mr. Sunderland cites that in his argument.

MR. WICKERSHAM: Yes, but in general, when you start to make rules for procedure at common law and in equity, you wouldn't consider that that included the making and establishing of a code of evidence, like Stevenson's Code, for instance.

MR. HAMMOND: Well, personally, I should want the authority in the Act to say evidence, before I would do anything.

MR. WICKERSHAM: Yes, it seems to me so. The general intendment of the word "procedure", doesn't include ordinarily the word "evidence." We say, "procedure and evidence."

MR. HAMMOND: Yes, you usually speak of both.

MR. WICKERSHAM: It seems to me we will have our hands full enough with what we have got to do, without going into the field of evidence.

MR. DONWORTH: There are probably some procedural matters that do involve substantive law, that there

is no reason why we should keep away from for that reason. You take the matter of the right to examine the plaintiff in a personal injury case before trial; I think that would be a proper matter for us to go into.

MR. WICKERSHAM: Yes.

MR. DONWORTH: And if someone says, "Why, you have gone into the matter of evidence," we say we have, to the extent we think it is essential for our purpose.

MR. WICKERSHAM: Procedure; but that is a different thing from the rules which govern the kind of evidence that may be produced, what witnesses may testify to an opinion on direct examination, what on cross examination, and so on.

MR. LEMANN: I have a matter of rather large importance pending now, where an action was brought in the Federal Court against the heirs of a deceased person. We have a statute that parole evidence cannot be used in such a case where the action is brought more than a year after death. Is such a statute controlling in this Federal Court action? If we go into the field of evidence, and undertake

to prescribe rules on that subject, would we have the authority then to decide -- I presume we would -- that statutes of that sort would no longer be controlling?

MR. WICKERSHAM: Well, I ran over the subjects dealt with in the Federal Judicial Code:

Section 631, competency of witnesses, as governed by State statute.

Section 635, mode of proof in trial of cases at law, shall be by oral testimony taken in open court.

Section 636, books and writings may be compelled to be produced at trial.

Section 638, any admitted handwriting of a person may be used for comparison as to genuineness.

Section 643, depositions may be taken also according to the laws of the State or District.

Sections 644 and 645, deal with depositions. in perpetuam or in memoriam.

Sections 647 and 648, subpoenaes.

Section 653 deals with letters rogatory.

Section 654, witnesses could be subpoenaed from any District, until 1928, by permission of the Court; and so on.

MR. DODGE: All questions of practice.

MR. WICKERSHAM: All questions of practice, rather than substantive law; but that is all already in the statute.

MR. CLARK: Well, you know, I am not quite so sure why you say that so quickly. I should say you have been reading a good many statutes on evidence that are general; the oral testimony statutes, for example.

MR. WICKERSHAM: Yes. As I say, it is not logical, but these are statutes; these are provisions which are put in the Federal Judicial Code.

MR. DOBIE: Of course, there are a great many statutes where the two run right together. For example, in a number of States they say that unless incorporation, alleged in a declaration, is specifically denied, no proof of it need be offered. I think clearly that is a procedural statute, and I think we have a perfect right to make rules on that subject; and the same thing as to what they say about handwriting, and a number of those things; so that there are going to be some things for our attention.

MR. WICKERSHAM: Oh, yes, there always are; but

the whole question now is as to whether or not we are going to make a code of evidence.

MR. DOBIE: Yes, whether you are going to take up the hearsay rule, and promulgate a code on that?

MR. WICKERSHAM: Yes. In other words, whether we shall take Wigmore, and revise him for Federal procedure.

MR. OLNEY: I am quite sure the Bar at large has in mind tne very distinction mentioned in the letter Mr. Mitchell read.

MR. WICKERSHAM: It seems to me so.

MR. OLNEY: We have in mind, for example, that such things as the matter of discovery are procedural rights. I, for one, am very much interested in seeing that we devise a proper method for discovery,--

MR. WICKERSHAM: Yes, that is procedural.

MR. OLNEY: (Continuing) --in Federal courts. But wewould look upon that as procedural.

MR. WICKERSHAM: Certainly, I would.

MR. OLNEY: But if we endeavor to formulate rules of evidence, in regard to the admissibility of tes-

timony --

MR. WICKERSHAM: We won't get in before Congress in 1936.

MR. OLNEY: (Continuing:) --we are biting off something that we won't be able to chew at all.

THE CHAIRMAN: I call your attention to one other fact: We are dealing here, not with the question of whether "procedure" in some uses includes "evidence". We are dealing with the use of that word in that particular statute; I have inquired and searched, and I think I am safe in asserting that at no time in the last ten years that this statute has been under consideration has anybody in the American Bar Association, or in the debates in Congress over the bill, or any of the discussion of it, ever suggested that it included the job of writing a text book on evidence, to establish one system of rules of evidence in the Federal Courts and another in the State.

There has never been a breath of that mentioned, which is a significant fact when you come to think about a particular Act.

MR. WICKERSHAM: Well, I move that it is the sense

of this Committee that the writing of a code of evidence is not included within the general scope of the statute, as we understand it, and the work that we are undertaking.

Of course, certain provisions which relate to the method of procuring evidence, and certain borderline cases are dealt with; but the general view of the Committee is that it is not within the contemplation of the Act that a code of evidence shall be prepared.

MR. CLARK: I wonder if Mr. Wickersham would be willing to include the word "tentative sense"?

MR. WICKERSHAM: Yes.

MR. CLARK: Because, it may be that when we get farther along --

MR. WICKERSHAM: Well, all right. It is the present sense of the Committee --

MR. CLARK: All right.

MR. LOFTIN: I second the motion.

THE CHAIRMAN: Is there any further discussion?

MR. WICKERSHAM: There again, if the Court differs with us, they can say so.

MR. DOBIE: Yes. If they ask us to prepare a code, we will do it.

THE CHAIRMAN: I don't know whether we will or not. I will reconsider my acceptance --

MR. DOBIE: You may resign?

MR. OLNEY: I don't think there is any danger of the Court asking us to do it.

MR. CHERRY: It is perfectly safe to be willing.

THE CHAIRMAN: If there is no discussion, what is your pleasure?

All in favor say "aye."

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. DOBIE: Mr. Chairman, before we adjourn for lunch, I would like to bring up a matter that seems to me quite important, just to know the sense of the Committee.

It seems to me rather important that what this Committee does in our proceedings here be not given out to the public. It seems to me that the Secretary and the Chairman should be the ones that would take care of that. I think it would be very unfortunate, for example, if one of us went back and told a newspaper reporter what we had done here, or that General Wickersham had advocated so-and-so, or Dean Clark thought this.

MR. WICKERSHAM: Or that Mr. Dobie, the great authority on Federal procedure,had certain views.

MR. DOBIE: I have no official position, but that is my idea. I have discussed it with Dean Clark, and he seems to agree with me. I do think it is rather important, --

THE CHAIRMAN: I am glad you brought that up.

MR. WICKERSHAM: I think it is very important.

MR. DOBIE: (Continuing) --that we do not give out

any information to reporters; that we leave that to the very sound discretion of yourself and Major Tolman.

THE CHAIRMAN: I would like to go a little further than that.

MR. DOBIE: The reason I brought it up now is, before we went to lunch --

THE CHAIRMAN: Yes, you are right about it; I am glad you mentioned it.

We are an Advisory Committee to the Court. We have got to bear in mind that it wouldn't be courteous to the Court, and they might resent it, if we disseminate stuff, or circulate decisions that are confidential, or do anything of that kind without their authority. And I think we not only should not tell newspaper reporters what is going on in our meetings, but that when it comes to the drafting work and all that sort of thing, we ought to use care not to give any publicity to it. It will have to be submitted to a good many people, but it always will be confidential; and we never ought to give out anything as our conclusion or draft until the Court says so. I think they would be very quick to pick us up on that.

MR. WICKERSHAM: Yes.

MR. DOBIE: I think if a reporter came to you and you wanted to give out that the Committee had met and started on its work, that is quite all right, anything you want to give out; but I think individual members should not, because it seems to me there is that germ of a great deal of harm and dissension, which might very seriously affect our work.

THE CHAIRMAN: That will be taken as the sense of the meeting, unless there is some objection.

MR. WICKERSHAM: Yes.

MR. DONWORTH: Mr. Chairman, some of us come from a distance, and may be interested in how long a session we may have at this time. Have you in mind having another session tomorrow?

THE CHAIRMAN: Well, the progress we are making, I am in hopes, if we don't spend too much time at lunch, we can come back here and plug along this afternoon and fix things up so that anybody who wants to leave can go tonight; but that is up to the Committee. I am at your service, as long as you

want me.

MR. DONWORTH: I am also. I was just looking for a general idea.

THE CHAIRMAN: Yes. We can't tell what we will get into this afternoon. We are going into some of these particulars, and they may take some discussion; but I really feel, from what I know, we ought to finish late this afternoon, or may be early this afternoon.

MR. DONWORTH: I didn't wish to hurry proceedings at all.

THE CHAIRMAN: Lunch is set for us across the street. It is a quarter past one. How much time do we need for lunch?

MR. DOBIE: We lunch in a body, do we?

THE CHAIRMAN: That is at your pleasure. Major Tolman has kindly made arrangements for us at the Club over here, for those of us that want to go together.

MR. WICKERSHAM: That is a good idea. Well, if we are going to lunch together, I suppose we

can adjourn for an hour. If we get back sooner, all right; if we get back a little later, that will be all right.

THE CHAIRMAN: Did you have an idea you had some engagement that would take you elsewhere?

MR. DODGE: Yes, I had. I was hoping somebody would say a quarter past two.

MR. CLARK: Couldn't we say two o'clock, and that will probably mean a few minutes after?

(Whereupon the meeting adjourned until two o'clock p. m., of the same day, June 20th, A. D. 1935.)

AFTERNOON SESSION.

THE CHAIRMAN: Will the meeting come to order?

Mr. Hammond has called my attention to a provision of the Act which is badly drawn, and we ought to have the sense of the meeting on it.

It says that they "shall have power to prescribe by general rules for the District Courts of the United States and for the courts of the District of Columbia" --

MR. DOBIE: "Supreme Court of the District of Columbia", isn't it?

THE CHAIRMAN: It should be, but it isn't; but it obviously meant that court in the District of Columbia that corresponds to the United States District Courts, which is the Supreme Court; so that, unless there is some objection, we will take it as the sense of the meeting that we should construe that as being the Supreme Court of the District.

MR. DODGE: I think the Court so construed it in the order.

MR. DOBIE: Yes. In the order of the Court, it is "The Supreme Court."

THE CHAIRMAN: Now, we have a miscellaneous lot of matters that the Reporter would like to bring up.

The first one he has raised is the question of how far, if at all, our rules will affect the matter of appellate review.

Now, in order to start the discussion on it, I will just simply say that I have had the idea that we have nothing to do with appellate review, in one sense. On the other hand, there are a good many procedural matters in the course of trials and proceedings in a lower court that ultimately form a basis for appellate review. My thought has been that, in any matter of that kind that has to do with the proceedings in the District Court, we have power to act; and I will illustrate that in this way:

For instance, I think we could make a rule that if a man made an objection, and his objection was overruled, or sustained, it wouldn't be necessary for him to note an exception; it would be taken that the exception was noted.

That is an illustration of a step in the trial court that we ought to have control over, that really has a bearing on the review feature.

That is all I have to say about that, but

that point is open for discussion.

What is your thought about that, Mr. Reporter?

MR. CLARK: A real problem comes up there, which is reflected back in the union of law and equity.

The present situation is that in equitable actions, following the old system of review of the English Court of Chancery, the Court is expected to review the facts as well as the law. That developed, really, at a time when testimony was taken by deposition; it was entirely a matter of formal papers, and it is no longer nearly as necessary, if at all, as it was under the former procedure.

In actions at law which go to the jury, I suppose it would be unconstitutional to review the facts; certainly, the procedure is to review only errors of law.

That is the formal distinction which is reflected back into the necessity of some separation.

I might say that I have great difficulty in finding lawyers or law teachers or other people who could tell the difference between law and fact; generally, it seems to be that whatever

the appellate court wants to review is either law or fact, as the case may be. The distinction, I do not think is nearly as real and vital as the formal requirements make it.

If we have to continue those two systems of review, we are to that extent preventing a complete union.

Now, in the States, those two systems of review are continued in some of the code States, and not in others. They are continued in New York, for example; and in my judgment, that has been one of the reasons why the union of law and equity has not been more satisfactory in New York. They are not continued in a great number of States, including my own, Connecticut; and I know there are special provisions in New Mexico and Arizona. My impression is they are not continued in Minnesota, but I don't know that I am sure about that.

MR. CHERRY: You are right.

MR. CLARK: Now, I should suppose that we have got to make provisions regulating somewhat the procedure for a judge acting without a jury. In fact, I think the provisions for waiver of

jury trial, and the jury trial right generally, are essentials.

Now, if we leave the matter there, in the case of a trial to the court without a jury, we are going to have the situation pretty uncertain. That is one of the features now that is pretty uncertain in Federal procedure, the method of appeal where jury trial is waived.

I should suppose, in any event, we would want to carry the proceedings on through to the final action in the District Court; that would probably be within our power; but how can we do it unless we know what the function of appellate review is going to be?

That is somewhat the problem. That is a necessary part of our proceedings. The scope of our job includes the preparation of steps to the end of the action in the District Court, and yet those steps are conditioned by the scope of appeal.

THE CHAIRMAN: Can't we accept the present system, statutory or otherwise, that fixes the scope of appeal?

MR. CLARK: Yes, we can accept it.

THE CHAIRMAN: Have we any option about it?

MR. CLARK: Well, I don't know. I throw out the question. That, again, is a similar question: How extensive is the scope of our statute?

I might say that I hate to accept it, because it does provide for the divided form of appeal.

MR. DOBIE: There is another point in there, of course. Any fact found by a jury can only be reviewed, as you know, in accordance with the common law; you have got to watch out for that pretty closely. I think there is a point of difficulty. You remember that case of Dimick against Pate, don't you?

MR. CLARK: Yes.

MR. DOBIE: And you probably remember the very recent case they decided on the 3rd, where the Judge reserved the right, and then the Circuit Court of Appeals could hand down a decision without any trial.

There are going to be some right pretty points here; and probably this group knows that the law on what you have to do on appeal is in a

pretty muddy state. There are some decisions in there that say practically everything.

THE CHAIRMAN: Could you be more specific, and illustrate? I am not quite clear that I got the drift of it, what kind of rule or subject matter you have in mind that would raise the question.

MR. CLARK: Well, the question will come up very directly on waiver of jury. You have a provision now for trying a case in the Federal courts without a jury, and the form of appeal and how to take it is, as Dean Dobie said, very uncertain indeed.

The way that would be raised, I think the way that procedure could be simplified, and the way it is done in a good many code States, is by some provision of this kind: That if a jury trial is not claimed in a certain period, it is thereby waived, and the case goes on the calendar for trial by the Court.

Assume trial is had by the Court, and the Court has entered its judgment. What then is to be the method of appeal? Is it now to be as it would be if the judge were sitting as Chancellor; that is, a review of the facts; or is it now to be, as it was originally, a review of errors of law only?

THE CHAIRMAN: Why do we have to know that? I don't understand that.

MR. CLARK: Well, if the appeal is to be on a review of the facts, the simple way of doing it, and the only proceedings required by the District Court Judge would be as follows: To certify the evidence; all the evidence would go up.

If, however, the appeal was to be similar to the appeal in law actions, there would have to be some way which could be devised without great difficulty, whereby he filed a finding of facts; and the appeal was made for errors of law, rather than on the finding of facts he signed.

Now, the question is going to come up as to the provisions to be made in a case of waiver of jury trial, for proceedings after judgment -- unless, perhaps we want to stop and say that we will do nothing with proceedings after judgment. If we were to decide that, we would have nothing to do with motions to set aside verdicts --

MR. WICKERSHAM: Oh, that would be proceedings in the District Court; motions to set aside verdicts, motions for new trial --

MR. DOBIE: And motions <u>non obstante veredicto</u>; I

think we have got to go into those.

MR. WICKERSHAM: Yes, you are still in the District Court.

MR. LEMANN: So that would hardly be a line of cleavage, perhaps.

MR. CLARK: Yes. I had thought we really needed to cover all proceedings in the District Court.

MR. LEMANN: Yes. If you did that, you certainly would take in some of what are generally called appellate matters; those proceedings in the District Court, and your motions for appeal, petitions for appeal, and citations.

MR. DONWORTH: Also the presentation of the bill of exceptions.

MR. LEMANN: Yes.

MR. DONWORTH: I think that needs clarifying, the procedure with reference to a bill of exceptions in the Federal Court. I think that is within our jurisdiction, because it is a proceeding in the District Court; and the matter of terms of court, I think that is within our jurisdiction.

At present, you know, unless the Judge

within the limits of the term of Court either extends the term or takes cognizance of the pendency of the bill of exceptions -- if he doesn't either extend the term or enter some order to take cognizance of the bill of exceptions, his power to settle the bill dies with the term.

I think that is for us to regulate; and on the specific matter that Dean Clark has referred to, it is true that when a jury is waived in the District Court at present, a complicated situation arises. In the first place, the statute says if the jury is waived in writing, the procedure shall be so-and-so. I think the decisions are that if the jury is waived, not in writing, the Judge is practically an arbitrator, --

THE CHAIRMAN: There has been an amendment to that statute, which I drew myself, which says that if the waiver is oral, in open court, it is as good as a written one.

MR. DONWORTH: Quite so; but if not entered in the minutes in open court, then the judge is an arbitrator.

Now, further, of course there is a difference in the attitude of the appellate courts toward a law action and an equity action.

If a jury is in fact waived, then the constitutional provision Dean Dobie has referred to, of course, does not apply; and then it is purely statutory, as to what kind of review you have.

In an equity case, the judge certifies the evidence; and then the appellate court, while theoretically entitled to render a decision de novo on the evidence, of course, gives great weight -- varying degrees of great weight, to the findings of their own court. Whereas, in a law case that goes up, whether a jury is waived or not, the procedure is quite different. You must have a bill of exceptions instead of a certificate of evidence, and so on.

It seems to me that all those matters are for us to recommend something on; and if we run into the question of the absolute procedure on an appeal, I think we might recommend the enactment of certain legislation to fit in with these rules, which Congress and the Supreme Court could consider as proper to be enacted, independently of what we recommend within our jurisdiction.

MR. DOBIE: There is that bill of review in equity, too, Judge, which is proper after the end of the term; whereas, in law, as you said, you can't do

anything at all unless there is something taken.

There is a great deal of spade work tobe done there, and I do say, if I have to say so, that is one of the best chances this Committee has got, to get rid of the complications; and I must confess I am hardly in accord with what you gentlemen said, that is, within our province.

MR. WICKERSHAM: Don't you think the settlement of the bill of exceptions is within our province?

MR. DOBIE: Oh, absolutely.

MR. CLARK: How far do you think we can go, Dean Dobie?

MR. DOBIE: Well, I think we will have to study the individual provisions, to answer that; but my general attitude is that we ought to go as far as we can, of course, watching out for the Seventh Amendment.. In that waiver of jury, as General Mitchell said, the statute very recently had to be written; if it wasn't written, of course, it is now in the opinions of the Court.

But the extent of the review, and whether you have to ask the trial judge for findings of fact, and what the appellate court can do; there

are hundreds of cases on that, and in the Circuit Court of Appeals a great many of them are absolutely in conflict. I think that is a field in which we cando a great deal.

THE CHAIRMAN: Why isn't this the right idea about it? It is admitted, so far as appeals are concerned in the upper courts, we haven't anything to do with them; we haven't the power to change the powers of the appellate courts as to their methods of review or what they can review; that isn't within the scope of this statute.

On the other hand, we certainly have the right to deal with all proceedings in the trial court, settling bills of exceptions, and all that sort of thing, that may ultimately form the basis for appeal.

Now, isn't it our task to take the existing law that regulates the appellate courts as to the nature of their review, and then, knowing what the lower courts have to do to prepare the basis for that, have our rules deal with those actions of the lower court that are required to form the basis for the review which is now permitted by law in the appellate courts?

It seems to me we have to draw a sharp line between procedure in the trial court which creates a record for review, and anything that amounts to a shift or an attempt to shift the powers of the appellate courts, or the nature of their work.

Doesn't that draw a sharp line, of itself, right there?

MR. DODGE: There is another very vexed question that makes a lot of trouble, and that is as to the effect of a request for an ordered verdict by both parties. That has led to a tremendous amount of litigation, as to what is open in the court above. Is that to be taken as a submission of all questions to the judge?

MR. DOBIE: I believe in New York, and General Wickersham will bear me out -- I believe they have a peculiar practice there of a one-man jury; I believe the bailiff, or sheriff, something like that; and I understand that has given some trouble. I remember there are a number of cases on that, where they make the distinction where a directed verdict is requested by both parties, and in these late cases, where it is requested by one. That Baltimore Line against Redman, decided on June 3rd,

backtracked on the Holstman case, if the judge, in refusing to give a directed verdict, reserves his decision on that.

MR. LEMANN: Can't we reach the tentative conclusion that we should consider it within our province to pass upon all so-called appellate procedural matters which transpire in the District Court?

MR. OLNEY: Is there any question about this: That we are not asked to advise the Court in any way whatsoever about the procedure in the appellate courts? Our function is simply limited to the District Courts.

MR. LEMANN: Yes, that is what I think we have all been having in our minds here recently, because the statute says the Supreme Court shall have the power to prescribe by general rules for the District Courts of the United States the forms, process, and so forth, in civil actions at law. So I would assume that we probably couldn't go beyond the District Court; but that, up to the moment where the District Court loses jurisdiction, we would go, even though that covered all these preliminaries

we have talked about here to an appeal.

MR. OLNEY: Doesn't it necessarily follow from that, just as the Chairman has said, that we will have jurisdiction, and it should be our duty to revise the procedure of the District Courts, in view of the existing law as to the methods of appeal? And that is just as far as we can go; we can't go any farther.

MR. LEMANN: It seems to me there is a possibility, when we get to the actual job we are on, we might find it desirable to recommend some changes in the methods of appeal, but that we would have to confine ourselves there to recommendations, perhaps to tie up what we thought was desirable; but for the moment, I think we would have to proceed on the theory that we could only go up, at least to what happens in the District Court, and having in view the present statutes, except insofar as we wanted to make recommendations for changes in them -- which would be merely placatory, I suppose.

MR. WICKERSHAM: Here is the provision of Section 875 of the Judicial Code:

(Reading.)

Now, all that has got to be done in the District Court. The question of a bill of exceptions on appeal, for instance. I suppose we could recommend, at all events, that a review of a judgment, whether at law or in equity, should be prosecuted by appeal, and not by writ of error.

THE CHAIRMAN: I should doubt that.

MR. WICKERSHAM: You have no doubt of that, have you?

THE CHAIRMAN: No. I doubt if we have anything to say about the method of appeal.

MR. WICKERSHAM: Well, that is a proceeding in the District Court.

MR. DOBIE: We couldn't change the method, I don't think. Of course, the writ of error is abolished in the Federal Court.

THE CHAIRMAN: They passed a new law, making everything an appeal, anyway.

MR. DOBIE: Yes. Of course, it is practically the same thing, under a different name.

MR. WICKERSHAM: At all events, isn't it perhaps

a little early to decide fully what we can do?

If we are agreed that anything which is done in the District Court is within the scope of our undertaking, there will come borderline cases; in connection with those, we might recommend something to be done to facilitate the consideration of the case in the Court of Appeals or the Supreme Court, as the case might be.

MR. DOBIE: Of course, one trouble you are going to run into there, General, you have ten Circuit Courts of Appeal, and so many of their matters are governed by their rules -- but I think we will find these judges very amenable.

MR. WICKERSHAM: Yes, very true. And then, after all, there are some statutory provisions that govern.

THE CHAIRMAN: Do you want any more specific instruction about that?

MR. CLARK: No, I think that is enough for the present.

THE CHAIRMAN: You have got the general sense of the Committee?

MR. CLARK: Yes, we can't foresee all; and it cer-

tainly seems clear that we want to cover all the District Court procedure.

THE CHAIRMAN: Well, the Reporter also asks this question:

Shall procedural expressions familiar to the profession, although subject to criticism for inaptness, be employed; such as "the real party in interest," "cause of action" and "ultimate facts"; or shall new and better phraseology be attempted wherever possible and desirable?

MR. CLARK: I might say in that connection that most of these are used in the equity rules, such as the word "real party in interest". The real party in interest is the designation of the plaintiff, and that is an expression coming from the original Field Code; it caused a great deal of trouble, because the courts thought at once that it meant somebody having the beneficial interest -- and it does mean that, but it also means a trustee, for example. The word "real" was rather misleading than otherwise.

On the other hand, it is now a standard expression, used in a great many codes.

What shall we do; try to improve upon

recognized but unfortunate phraseology, or accept it?

Now, the expression "ultimate facts" is one about which a great deal of debate can be made; but that is used in the equity rules as to the complaint, that the complaint shall state the ultimate facts. Shall we try to improve on these standard expressions?

THE CHAIRMAN: Well, it has two sides to it. Of course, an ideal code might improve the terminology a great deal.

On the other hand, I remember when I studied torts under the old system. Twenty years later, I picked up a modern text book by a law writer on torts, and I hadn't the faintest idea of what he was talking about; they had invented a lot of new epithets, terminology and expressions that might have been much better than the old, but that are new.

You are running into a serious problem there, if you hand out to the Bar a set of rules with a lot of new words in it, a lot of new definitions and so on, so that they don't entirely approve of them; you are liable to have a severe kick-back.

MR. DOBIE: I think there is another angle there.

I have talked too much, and I am going to stop, but there are some of these phrases that have been used by the Supreme Court. In one case that I remember, the problem was whether, if therewas a Federal question and a non-Federal question, and the Federal question proved devoid of merit, whether the Federal Court has jurisdiction. The Supreme Court held in that connection that they would go into the non-Federal question, if the non-Federal question and the Federal question together constituted practically one cause of action.

If we wipe out that phrase "cause of action"--do you see what I mean? In a case like that, it might be rather unfortunate, in connection with those decisions.

THE CHAIRMAN: It might take twenty years to decide what our new expressions mean.

MR. DOBIE: Yes. I believe you have got to decide that more or less conservatively. There was Wigmore's "autoptic proffer", and you all remember the outcry that went up.

MR. LEMANN: Some of these cases have construed these phrases, and insofar as they would now seem to

have a well-established meaning, it would seem that they should be retained, even though as an original proposition there could have been a happier word used.

Say that the courts now say this "real party in interest", for example, means the plaintiff. Where there is still controversy raging about them, perhaps we would be justified in hazarding the thought that we could get some non-controversial definition. That might not be a very modest assumption, of course.

MR. CLARK: Of course, there is one difficulty about these phrases, you never can be sure.

Now, the "real party in interest" phrase, I should say was pretty well accepted, that it meant not merely beneficial interest, but also a merely legal interest. In fact, the difficulty of that phrase is, it seems to mean so much, and it means so little. It didn't bring anything new into the law at all; it simply meant that the man who had the legal right to sue could sue.

MR. LEMANN: Wouldn't the better plan be, when you start drafting, you might use alternatives? I mean, it is a little difficult to have a hide-

bound rule right now.

THE CHAIRMAN: About all we can say now is whether we want the Reporter to be conservative about that, or non-conservative.

MR. LEMANN: Which, of course, he will interpret to suit himself.

MR. OLNEY: Mr. Chairman, if we do anything but adopt the rule that the Reporter shall be very conservative in that respect, we are just going to build up any amount of trouble.

Every time the legislature meets and changes some old expression, there is promptly a new crop of litigation; and that is exactly what we will find here.

So far as we can, we have got to, unless there is something genuinely the matter, something that insists on being cleared up, we have got to use the old expressions or we will be in trouble.

MR. WICKERSHAM: You will remember how much criticism we have had over the Restatement of the Law of Torts in the Institute, because of the employment of phraseology which was not the recognized and accepted phraseology of the law;

and I don't think there is any one thing that has been more criticized than the use of that language.

THE CHAIRMAN: Don't you think that our draft would raise an outcry with the Bar if we handed them something with a lot of new words in it?

MR. WICKERSHAM: Oh, there would be a howl from one end of the country to the other.

MR. CLARK: Well, I have no expectation of using autoptic proffer -- but I take it, the general feeling seems to be, to be reasonably conservative.

MR. WICKERSHAM: That is how it seems to me. And a good many of these phrases are used in the codes. For instance, Michigan:

> "All pleadings must contain a plain and concise statement, without repetition, of the facts upon which the pleader relies in stating his cause of action or defense, and no others."

Now, personally, I like that phrase: "His cause of action or defense."

MR. DOBEY: I don't think you can get away from that.

MR. WICKERSHAM: I don't think we ought to try to.

MR. CLARK: Of course, I have written two or three articles defining "cause of action" --defining it,as I still think, quite properly -- that has called forth a whole crop of articles saying that I defined it wrongly.

MR. WICKERSHAM: But don't you think the Bar in general would kick if you took out "cause of action?"

MR. CLARK: Oh, yes. I think we can perhaps lessen its use, but I don't think we can get away from it altogether.

THE CHAIRMAN: What other points would you like to bring up?

MR. CLARK: Perhaps I might run over these, and make some tentative suggestions and see how it will strike the group. I asked:

What action, if any, should be taken on the following subjects?

And I will answer, in general, I think we ought to make some rules on them:

Process; Venue -- I might say as to that --

THE CHAIRMAN: Well, Venue -- you mean the district in which a man can be sued?

MR. CLARK: Yes.

MR. WICKERSHAM: You have got statutory provisions --

MR. CLARK: Yes.

MR. LEMANN: We override that, certainly, as to law actions.

MR. WICKERSHAM: I am just calling attention, there are a lot of statutory provisions you have got to take note of. If you attempt to overrule many of them -- I mean to say, unless there is some good, overwhelming reason for a change, it seems to me it is unwise to attempt to revise the whole subject which is dealt with in the judicial code.

MR. CLARK: Well, there is a problem there; Mr. Wickersham referred to it this morning. Should we incorporate in this draft the provisions of the Code, in order to make our rules complete?

MR. WICKERSHAM: Yes.

MR. CLARK: I don't know, on that; I would like suggestions. I would rather hesitate to say. It might be easier for the lawyer to have it all in one place, but we might never be sure we had included all that we should have, or we might have included something that we shouldn't.

MR. WICKERSHAM: I don't think we ought to attempt to repeat the statute in these rules.

In the first place, it is an invitation to Congress to be constantly tinkering with it. If you take their statutes as they are, unless there is absolute necessity to modify one, they are not so apt to interfere with rules of the Court as they would be if you embodied a lot of statutory material.

MR. DOBIE: The general provisions of Venue have been pretty well established and interpreted.

MR. WICKERSHAM: You have got constitutional limitations on it, too.

MR. DOBIE: I remember that, because I wrote three articles on Venue.

One proposition there that does occur to me is, whether or not we ought to go into the great many exceptions; like, in a particular case, two defendants in the same State, but in different Districts; then in connection with that 1857 statute on local actions.

I do think we might go into the problem of whether or not it is necessary to have all of those tremendous number of exceptions -- and of course, Admiralty is absolutely separate. It is

the most liberal thing in the world.

MR. CLARK: How about a transferable case, brought in the wrong court?

MR. WICKERSHAM: You mean from law to equity?

MR. DONWORTH: Just what do you mean by that last question?

MR. DOBIE: You mean brought in the wrong District in the same State?

MR. CLARK: Yes.

MR. DOBIE: It does seem to me that we ought to go into that question of differences -- they have gotten that fearfully complicated -- differences in the Districts, and whether or not that applies to differences established by the judges. That never has been decided by the Supreme Court. What I am after is, the big things have been decided there on the big statute, but I think we might do some work in ironing out a great many of the exceptions and complications that seem to me to be utterly unnecessary.

MR. OLNEY: On this matter of Venue, do I understand the suggestion is made that we endeavor to

formulate rules with regard to the venue of the courts? Isn't that a matter entirely without our province?

MR. CLARK: Well, my general suggestion wouldn't go that far. It can be covered this way: I wondered if we couldn't make the rules of Venue a little less harsh; particularly for a transfer between courts, or at least between districts of the same State; that is, to avoid failure of an action?

MR. OLNEY: Have we anything to say, under this order of the Court appointing us, in regard to the Venue of the District Courts?

MR. LEMANN: It becomes a question of whether it is a matter of practice or procedure,

I suppose our power depends upon a construction of the wording in the statute "practice and procedure". I wondered whether Venue was ordinarily considered as covered by that expression "practice and procedure." It says, "forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law."

If we go by the rule of ejusdem generis, I should think it very doubtful.

MR. WICKERSHAM: Especially of course, as in the

Federal court, venue is determined largely by constitutional and statutory considerations.

MR. CLARK: Then I take it, the judgment is we had better stay pretty well away from it?

MR. WICKERSHAM: I should think so.

MR. DOBIE: Of course, Process and Venue are closely bound up together. I mean, they are separate things--now, after you have solved the question of Venue, the question of where to serve process is an utterly different one.

MR. LEMANN: You discuss Venue in your book on Pleadings, Mr. Clark.

MR. CLARK: A little, yes.

MR. DOBIE: Of course, even in a book, Venue is not jurisdictional; it is freely waivable. I mean, where a process runs -- as you know, now it is very restricted; process ordinarily doesn't run out of the District at all; and does "formal process" include where it runs? There are going to be a lot of those problems.

THE CHAIRMAN: You will get into hot water if you start a rule and hand it to Congress, saying you

can serve a process in the Chicago courts on some fellow in California. They will "rear up" about that; they are very sensitive about dragging a man around the country in the Federal courts.

MR. DOBIE: You remember that Roberts case; the Labor Board case, in which they held they could summon a man to any court they wanted to, but when they wanted to proceed against him they had to bring it in the court in his district. Congress has construed those statutes very strictly. I doubt if we want to do it, but it is a very complex problem, and there are so many exceptional statutes -- there are at least twenty. You probably also remember those Interstate Commerce Commission cases.

MR. WICKERSHAM: You have got special statutory provisions, and it seems to me it would be very unwise for us to get into that. Where a suit is brought in the proper District, but in the wrong Division, there might be a provision for transfer by order of the Court. I just take that, as an illustration.

MR. DOBIE: It is a very good one.

THE CHAIRMAN: And of course, you would have to do

with the procedure, the forms and methods of raising the questions.

MR. WICKERSHAM: Of course.

MR. CLARK: Then I have summary judgments; and motion for judgment by default, supported by affidavit, such as the procedure developed in New York.

MR. WICKERSHAM: That summary judgment procedure in New York has worked extremely well. By the way, have you seen Judge Sontag's paper on that ? It is an admirable review.

MR. CLARK: Yes, it is, indeed.

Well, this other motion, by the defendant, is really the converse.

MR. WICKERSHAM: The converse of it; practically the same thing.

MR. CLARK: And discovery, and rules under the Federal Declaratory Judgment Act. Those are the questions I asked.

I should think we ought to deal with these things I have just mentioned.

MR. WICKERSHAM: I think we have got to deal with Discovery, and all those cognate questions on

Discovery.

MR. OLNEY: I feel very strongly we should deal with the matter of Discovery.

THE CHAIRMAN: And I think it follows, we ought to deal with rules under the Federal Declaratory Judgment Act, too.

MR. WICKERSHAM: Yes. Well, that is a new practice.

MR. CLARK: Yes. The Federal Act was passed about the same time.

MR. WICKERSHAM: I say, but there are precedents in other States that could be used.

MR. CLARK: There is some little difficulty as to the use of jury trial, there.

MR. WICKERSHAM: Yes, there is.

MR. CLARK: One District committee, namely, the Ohio Committee, has been raising that, as to how to safeguard jury trial.

MR. TOLMAN: I wrote a letter to Professor Borchardt on that subject, and asked him if he would care to submit any ideas. He wrote me back and said he would be glad to, but he thought the Act itself was so

detailed and had so much of practice in it that it wouldn't be a very large subject.

I don't know how he figured that out, but he thinks that most of the procedure is covered by the Act, and that procedure in that Declaratory Judgment proceedings will not need very much treatment.

MR. CLARK: I might say this gentleman in Toledo, Mr. Marshall, I think, Chairmanof the Committee, wrote in at length on this matter I am speaking of, the question of jury trial, and Mr. Borchardt gave me quite a long memorandum on that point, as to what the rules should establish as to the use of jury trial.

The Connecticut Declaratory Judgment Act says that jury trial shall be had on issues, as in other actions. That is my present impression, that a rule along that line would be sufficient.

MR. WICKERSHAM: The statute is not very elaborate. It is very concise.

(Reading statute.)

MR. DONWORTH: I should think that ought to be sufficient.

MR. WICKERSHAM: Well, it may call for some rules in connection with it. There is a memorandum in here, following that, but the procedure hasn't been -- I don't think there are many cases yet that have arisen under this statute.

MR. DOBIE: There are very few in the lower courts, and the only one in the Supreme Court was a case invoking its original jurisdiction. That was the case, you remember, in which they said there was no actual controversy, and therefore they threw it out; as a matter of fact, it wasn't really necessary to decide that.

MR. WICKERSHAM: Was that brought before this statute?

MR. CLARK: No, it was a West Virginia case; and it said the State of West Virginia does not claim to proceed under the Declaratory Judgment Act; but, even if it did, it is clear there is no actual controversy. That is all the Supreme Court said.

MR. CLARK: Of course, these things get rather detailed. I don't know, it might be expecting too

much to expect offhand opinions from you all. These are all technical points, too.

You might be interested in Mr. Sunderland's suggestion on Discovery, which I think is very interesting. He suggests two alternatives: One is the State procedure, and another is a new Federal provision. That is, he wants to get lots of discovery, and that is the way he is going to do it.

That is, the idea is that you can proceed under either. He is going to get it as broad as he can.

MR. WICKERSHAM: Get it coming or going.

MR. CLARK: Has any member of the Committee any reaction as to that scheme?

THE CHAIRMAN: One leg of it put you back on to the problem of whether our rules are general or whether they aren't.

MR. GAMBLE: I think we ought to make a rule; not have an alternative of that kind.

MR. LEMANN: If he wants to get the best rule, let us examine the rules of the 48 States, and pick out the broadest one.

MR. DOBIE: That is what I think. That alternative method imposes on the appellate courts, too, the necessity of knowing the laws of all the States.

I think we ought to take the most liberal rule that there is; enact that, and leave the other out.

MR. CLARK: That is rather my conception, too. I might say, not all of the lawyers or judges feel that way. Judge Augustus Hand said to me, he thought extensive rules of Discovery might be rather dangerous, particularly in New York City.

MR. WICKERSHAM: Well, that is an observation born of experience. Of course, that has led to gross abuse.

The essential thing, it seems to me, is that these examinations before trial ought to be conducted in the presence of a judicial officer having power to rule. Otherwise, they become simply means of annoyance and blackmail. In England, where they have these standing Masters, who are competent lawyers, the rules work very well. But unless you have a judicial officer, I think it is open to very grave abuse. That is my opinion.

MR. DOBIE: Would you include Masters in chancery

in that description?

MR. WICKERSHAM: A good Master in chancery, yes. We have had standing Masters in New York; we have had some admirable men, and nobody would object to going before them. Of course, you have got to be sure you have that kind of judicial officer with power to rule on the evidence, subject to appeal to a judge, but with power to rule on the evidence, and power to rule on what shall be produced; otherwise, you have a great engine of oppression.

MR. DONWORTH: But, unless you couple that with the right of the party to suspend the taking of the testimony until there is a court ruling on the particular question --

MR. WICKERSHAM: Yes, yes.

MR. DONWORTH: Of course, that involves delay, and would be used for purposes of delay; but perhaps it is necessary.

MR. WICKERSHAM: Well, the trouble is we have that in our State practice, you know. We can suspend examinations until the question can be submitted to the Judge; and it helps very little, because the Judge is busy and hurried, and he gives very slight

attention to the question, unless it is an obvious abuse. Usually he says, "Oh, well, take it subject to objection on the trial," and that is that.

But, if you have a competent Master, with power to rule, with the right to review his decision, of course, by the Court, you minimize the evil effect of the system very greatly.

MR. CLARK: Now, I had added a series of possibilities. I don't really know whether you want to take them up or not. These appear to be certain forms of detail. I have discussed them in this recent article: Provisions as to jury trial, as to waiver, as to joinder of parties --

For example, on joinder of parties, the newer English provision, now being adopted in some of the newer practice acts, the test there is met whenever there is a common question of law or fact; they may be joined, subject to the discretion of the trial court to order separate trials; and there is fairly free joinder of causes of action.

That is the rule now in Illinois; it is the rule in New York, and so on.

The subject matters of detail are as to what we have called "third party practice"; the provisions for citing in parties. You have had some

experience in New York with that; Wisconsin has had it. That, by the way, may bring up some question that has troubled us in thinking about it, as to diversity of citizenship.

MR. WICKERSHAM: Yes, that does.

MR. CLARK: We are not just clear how to solve it. Our idea was for fairly broad provisions for citing in third parties; we felt that was desirable; and then we didn't quite know what that would do to the diversity situation.

Those are all details. I shall be glad to take them out.

THE CHAIRMAN: Don't you think we really had better leave that until you have, or you and your staff have taken what you consider the most modern and up-to-date things, and put it in shape for us to chew on; rather than attempt to guide you in advance?

MR. CLARK: Well, I do think so. I do think it might be useful, if you are willing to read over this article of mine, which discusses several of these.

MR. WICKERSHAM: That question brings up the

very question of statutory jurisdiction that has been raised. If it does interfere with the adoption of a complete system, we can't help that.

THE CHAIRMAN: There is a constitutional limitation on jurisdiction, too.

MR. WICKERSHAM: Yes.

MR. DOBIE: Of course, if you can drag them in, I don't think we can go into that, because that is clearly a question of jurisdiction. I don't think they want any advice from us on that subject.

MR. WICKERSHAM: No, I think not. There again, you run into what General Mitchell said a while ago: If you allow process to a fellow in California to bring him into a suit in New York, on the theory of making him a full party and getting a judgment against him that is enforceable everywhere, whether he appears or not, you will raise a howl.

MR. GAMBLE: Of course, we have a lot of new laws, especially new bankruptcy laws taking the place of the older forms of action, where the jurisdiction of a single court is broadened to cover everywhere. I am wondering what effect that might have. Are we to consider that kind of Act?

THE CHAIRMAN: Bankruptcy matters?

MR. GAMBLE: Yes.

THE CHAIRMAN: The bankruptcy act itself contains a clause authorizing the Court to prescribe general orders and rules in bankruptcy.

MR. GAMBLE: Yes.

THE CHAIRMAN: I wonder whether that oughtn't to be considered as a separate subject, and outside our scope? Judge Evans this morning, brought that up in conference here; I had a little chat with him. He seemed to think there ought to be some new rules respecting reorganizations, particularly, and so on, under Section 77. He said it was sort of an equity practice, and might come under the head of equity rules.

MR. WICKERSHAM: That is a suggestion that has been given --

THE CHAIRMAN: I thought we were probably going afield there; we ought to leave bankruptcy alone.

MR. WICKERSHAM: Yes, that is a separate entity. I do not think we ought to take up bankruptcy at all.

MR. GAMBLE: I grant you bankruptcy; but these new forms under 77-B, in one sense of the word, are scarcely bankruptcy, as we have known it heretofore; it is a substitute of the old equity jurisdiction by way of receivership.

I would much prefer that we would not have our way complicated with that novel procedure. But, just the same, when you talk about extra territorial process, each one of these new actions is said to be a civil action, or a substitute for a civil action. There ought to be some consideration given to the broad terms of those new statutes.

THE CHAIRMAN: Don't you think, as a result of Mr. Gamble's bringing the subject up, that we ought to conclude whether we are going to deal with bankruptcy rules in any aspect of them, or whether we are to leave any new rules under the reorganization provisions of it to be adopted as separate matter under the machinery provided in the Bankruptcy Act?

MR. GAMBLE: That is, in this summary you are going to submit to the Court?

THE CHAIRMAN: Yes. We probably ought to tell them we either are or aren't going to touch that subject.

MR. GAMBLE: In order to bring it to a concrete form, I move that it is the sense of this Committee that we do not include rules governing bankruptcy or reorganization in bankruptcy in our work.

MR. WICKERSHAM: Second it.

THE CHAIRMAN: Any further discussion of that?

MR. OLNEY: I would simply like to make it, that that is tentatively our opinion.

MR. GAMBLE: Yes.

MR. OLNEY: I am in this position, Mr. Chairman: Many of these matters that have been discussed recently, I can't form a definite opinion about them until I have got an idea of the scope of the work that we are to do and the relation of these particular things to that, and before -- I am pretty sure in my mind we want to do this particular thing; but some of these other matters that have been brought up, I am not so certain about.

I come back to the desire that one of the first tasks of the Reporter be to send us a general outline of what he has in mind, and the subjects to be covered, and how they are to be covered;

that is, the object to be driven at. Then we can tell about all these problems very easily, I think, and very definitely.

MR. GAMBLE: I am very glad to accept the amendment to my motion, that it is tentative.

MR. WICKERSHAM: All of these, as I understand, all the resolutions we have been adopting are the tentative views of the Committee.

MR. CLARK: On Judge Olney's suggestion, of course, one of the things I wanted to get -- and I think I have it -- is how far the Committee thought we ought to go on borderline matters; and I can't very well prepare the outline without knowing. But I get the impression that the Committee wants to be a bit conservative in our assuming jurisdiction.

Is that correct?

MR. OLNEY: If I may state my view about it, my view is that we want to be quite conservative in the extent of the field that we cover; but, within that field we want to go just as far as we can, in order to liberalize the procedure and get a result that will do quick and accurate justice.

So far as extending the field is concerned,

I think we should be quite conservative.

THE CHAIRMAN: Can we accept that as a motion for general guidance?

MR. OLNEY: Well, I will make that motion.

THE CHAIRMAN: It is pretty well stated.

MR. DOBIE: I will be glad to second it.

MR. WICKERSHAM: I second it.

THE CHAIRMAN: Any discussion about that?

All in favor say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. CLARK: I wonder if the Chief Justice would nod his head or something on that; because that is fairly important, I think, too.

THE CHAIRMAN: Well, of course, I am going to take this typewritten transcript, and pick out of it all of our questions and sort them up and send them to the Chief Justice, and tell him those are the recommendations of the Committee.

MR. WICKERSHAM: And see what he has to say about it.

MR. CLARK: I have just one other question, and that is whether the Committee have other things that they think should be included; of course, I would like to have them think that over, too.

Major Tolman may have some things that will come out of these suggestions, especially these things comparable to summary judgments, new devices of that general kind that may have worked locally.

MR. TOLMAN: Well, we have some memoranda, some correspondence and some suggestions on topics that haven't been spoken of today, but I don't think I need to detain the Committee to try to get them up out of my memory now. I will send them to

Dean Clark, whatever I have.

Generally speaking, the most important things that we have have been talked about here. I think it has been very comprehensive.

THE CHAIRMAN: Mr. Hammond, is there anything you want to bring up?

MR. HAMMOND: I didn't have anything particularly, no. I thought there were matters we could probably take up with Dean Clark, and then take them up with the Committee later.

MR. DOBIE: If there is anything about the general scope that we could decide here, it would be very desirable to do it. As I understand, I think we can handle the detail matters very much better if we have got something definite.

THE CHAIRMAN: Has any member of the Committee anything he would like to bring up?

MR. WICKERSHAM: Mr. Chairman, I spoke this morning of something, and I don't know whether we adopted a resolution on it or not. That was about provisional remedies, such as Attachment, Arrest, and Injunction -- Injunction is a little different; but, if it isn't already covered, I would like to

move that it is the sense of the Committee at the present time that we should not undertake to cover the field of attachments and arrests, in these rules.

THE CHAIRMAN: Are you referring to getting jurisdiction by attachment of property?

MR. WICKERSHAM: That is what I mean, especially.

MR. LEMANN: Jurisdiction by attachment, or issuing attachments --

MR. WICKERSHAM: Attachment of property, I am speaking of.

MR. DOBIE: Of course, you know the Federal rule is you can't have any jurisdiction of the person, based on attachment.

MR. WICKERSHAM: I know. Suppose you get the question of jurisdiction, and you can get jurisdiction by attachment against property, restricted to that property. You can't get general jurisdiction based on that. Now, we have got a statutory provision --

MR. DOBIE: You can't attach in Federal courts

unless you do get jurisdiction.

MR. LEMANN: You can't bring in a non-resident by attachment. For instance, in our State, attachment may be used where you allege the defendant is about to dispose of his property --

MR. DOBIE: Oh, yes, if you get personal jurisdiction over him. In other words, that is the remedy in the Federal courts now, as decided in Barry against the Big Vein Coal Company, which you probably just read. Another big question was raised in Clark against Wells. Suppose you have got jurisdiction in the State court with attachment; then it is removed, and you can't get any personal jurisdiction over the defendant; can you dissolve the attachment because it wouldn't have been issued by the Federal Court?

MR. LEMANN: That brings in a jurisdictional point. I think we have to consider whether we should consider these matters, insofar as they would involve jurisdictional matters.

Suppose I want to sue a man, and I can do it. Now, in doing it, I must follow the State statute on how to do it. Are we going to merely

say we don't deal with that, and that still should be handled by conformity with the State statute? Then, would that involve -- we have other remedies in Louisiana; enforcement of a landlord's lien, for example, and other liens, in proceedings at law. Are we to deal with that sort of questions?

MR. WICKERSHAM: Yes, you have got the Civil Law in Louisiana.

ME. LEMANN: Well, the procedure -- I should hardly call it Civil Law. Livingston wrote the practice; tne procedure doesn't use much Civil Law terminology. A good deal of it is in the Field Code.

MR. WICKERSHAM: It is not a bad starting point, by the way, for work of this kind, the Field Code.

MR. LEMANN: I should suppose in Washington or California or Iowa, you could really sue today and attach a man in the Federal court.

MR. GAMBLE: You can, on statutory grounds for attachment.

MR. OLNEY: It is a very effective remedy, and very common.

MR. LEMANN: What Mr. Wickersham's point raises, I suppose, is whether we should say that is out of our scope.

MR. OLNEY: As I understood Mr. Wickersham this morning, he was rather desirous that we do nothing whatever; or, rather, that we keep our labors entirely out of fields such as attachments and things of that sort.

Now, I don't know that we ever did attach anybody in a case in the Federal court; but it does seem to me that certainly the suitor ought to have that right, and it is a very effective means. If a man has a promissory note and the other fellow is simply twiddling his thumbs at him, you can go in and attach that fellow's property and bring him right up to time. Of course, that is under certain conditions, carefully guarded, and all that sort of thing.

That remedy ought to be in the Federal courts; it is something that helps in the administration of justice.

THE CHAIRMAN: Doesn't Mr. Wickersham's motion mean merely this: He raises the issue of whether we should prescribe uniform rules of procedure

in attachment in the Federal courts, or whether we should leave the subject of attachment to be governed by the general rule at the end that, except insofar as these rules apply, the local State practice under the Conformity Act shall prevail? You leave the remedy, don't you?

MR. WICKERSHAM: Yes, absolutely.

THE CHAIRMAN: But you leave it to the State, under the local statute?

MR. WICKERSHAM: Yes, that was my view.

THE CHAIRMAN: He leaves the remedy there --

MR. CLARK: Mr. Chairman, I want to make clear -- I think this is in line with what General Wickersham had in mind. The Federal Revised Statutes now, which I have here, in effect contemplate using the State rules. I think you wanted to retain them, but you weren't foreclosing the question of form?

MR. WICKERSHAM: No, no.

MR. CLARK: Because we are directed to draft forms of process; and I had in mind we want to draft a simple summons, and then probably how these remedies can be used. I think we may want some

rules that deal with the question.

MR. WICKERSHAM: Well, of course, in all these things there are certain things to provide for; but I meant in general, the subject of attachment of property, the subject of arrest of the person as a civil remedy, should be left to the State practice, and we shouldn't attempt to prescribe a uniform rule.

MR. CLARK: Yes. That is, we will have some rules on the subject, and the rules will follow that idea. It seems to me we will almost need some rules.

MR. WICKERSHAM: Oh, yes, you will need some.

MR. DOBIE: There is another thing there, General, another interesting problem; that is, that attachments in Federal courts are not under the general Conformity Act, but there is a special statute that permits Federal courts to adopt such State remedies as they see fit. Some of the Federal courts have adopted en bloc the State remedies, and others have not.

I have wondered whether we want to go into situations of that kind, of allowing the Federal courts specifically, in certain instances, to adopt certain rules. Some will adopt, and some will not.

MR. WICKERSHAM: Well, take it today, you haven't uniformity in the remedy of attachment or arrest of the person. The local practice is followed in the Federal courts, with perhaps such modifications as are essential.

MR. DOBIE: Practically all of the Federal courts have adopted the State rules.

MR. WICKERSHAM; Yes, exactly; and my feeling is that it is unwise for us to attempt to modify that.

MR. DONWORTH: I think,Mr. Chairman, that the use of the expression "provisional remedies" will be broader than General Wickersham contends in his discussion. For instance, receivership is a provisional remedy.

Shouldn't his motion be confined to attachments, garnishments --

MR. WICKERSHAM: Arrest.

MR. DONWORTH: (Continuing) --arrest on civil process, and certain designated --

MR. WICKERSHAM: That is what I meant.

MR. DOBIE: You didn't mean quo warranto, or situations of that kind?

MR. WICKERSHAM: Oh, no. I used the word "provisional remedies" because that happens to be the title in the New York Practice Act, which comes from the Code of Civil Procedure, and it does include receivership; and that, I would not include in my motion.

Let me limit it for the time being to attachment of property, arrest of the person on civil process, and garnishments.

THE CHAIRMAN: Judge Olney, do you want to say anything more on that?

MR. OLNEY: Merely, again I find myself in a position where I can have no definite opinion until I see just what it is.

It will be quite satisfactory, so far as I am concerned, to provide that practice in attachments and matters of that sort, existing in the State courts, should be followed in the Federal courts.

I feel that those provisional remedies of that nature are quite essential for the complete functioning of the courts as they should function; there should be provision for it, some way or other. Just how it should be done, I am not yet in a

position to have an opinion.

It seems to me that this is one of those things that should be considered definitely, and a definite opinion reached about it when we have more information before us and can see just the scope of what we are trying to do.

That is the only suggestion I have to make.

MR. WICKERSHAM: My motion is a tentative one. All these tentative decisions we are now making are subject to reconsideration and review; but, as at present advised, it seems to me those fields we ought not to venture on.

THE CHAIRMAN: Suppose you amend it in this way: If, in the course of their drafting the Drafting Committee find it desirable to enter into that field to any extent, they may feel at liberty to propose it to the Committee?

MR. WICKERSHAM: Oh, certainly. I think that ought to apply to everything we have ruled out.

MR. GAMBLE: Mr. Chairman --

MR. WICKERSHAM: Is that motion satisfactory?

THE CHAIRMAN: Well, yes. I have got to put it with those qualifications.

All in favor of the motion say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. GAMBLE: I would like to inquire of Dean Clark if he has a copy of the list of subjects to be considered which accompanied the letter from the Attorney General to the senior Circuit Judges of January 24th?

MR. CLARK: Yes, I have that. It was published in the Massachusetts Law Quarterly at the time.

MR. DONWORTH: But that did not go beyond the law side of the Court.

MR. DOBIE: Mr. Chairman, I would like to ask a question, if it is in order.

Is there any question in the minds of the Committee as to whether there is any difficulty about our going into removal procedure, on the removal of cases from State to Federal courts?

THE CHAIRMAN: I have supposed the question of the right of removal is a thing we can't touch; but when it comes to the mere procedure in the District Court as to motions to remand, and things of that kind, it is within our scope.

MR. WICKERSHAM: Is there any real question there? That is a very simple procedure.

MR. DOBIE: The procedure is simple, but there

are some right difficult problems in there which the Supreme Court has never passed on; borderline cases; then there is the question of who can remove.

MR. WICKERSHAM: But doesn't that depend on the construction of the statute?

MR. DOBIE: The unfortunate thing about it is that those statutes are very badly drawn.

MR. WICKERSHAM: Well, is that really within our scope?

THE CHAIRMAN: Aren't you getting into the question of the right of removal?

MR. DOBIE: I think you are. That is what I am talking about. I shouldn't think that is a procedural question.

Suppose I bring a suit against Clark and Lemann; there is a possible controversy as to Lemann, but he is a resident of the State in which the suit is brought. The United States Supreme Court has never passed on that.

I should say the problem of who can remove is not a problem of procedure at all, but merely a problem of the right of removal. I don't believe that is a procedural problem, because that in-

volves the right of removal.

MR. WICKERSHAM: That is fundamental law; that is the right, not the procedure.

MR. DOBIE: Yes, I think so. There is a lot of stuff in there that I would like to see made clear, but I don't believe we can go into it. I would like to get the reaction of this Committee to it.

MR. DONWORTH: That seems to be just a case of omissions in the statute. That section says it may be removed on the petition of the defendant being a non-resident of said State, --

MR. DOBIE: And the possible controversy one doesn't mention that.

MR. DONWORTH: It goes on and says: "Whenever in any suit between citizens of different States, such suit may be removed by any person actually interested in said controversy."

It doesn't say "being a non-resident", but I think we will have to leave that to the Court to supply, some time.

MR. DOBIE: I don't think we could do that. If we could, I have very definite ideas. To me, the idea of a separable defendant -- there are two

cases, as you probably know, one holding one way and one the other. But I don't think we can go into that; I don't think that is procedure at all.

THE CHAIRMAN: That seems to be the general sense of the meeting. Of course, it may be, when you are working on this subject, you will find existing statutes that we can't change and that are not procedural matters, and it might be useful for you to accumulate a bunch of recommendations about that for amendment, just as a friendly gift to Congress; but I don't think it comes within our scope to deal with it beyond that.

Is there any other matter that anybody wants to bring up?

MR. CLARK: Mr. Chairman, under the English procedure they have certain provisions for shortening pleadings; one of endorsement on the writ a short and summary statement. Then there is another which is very recent -- they call it the new rules of 1932, I think -- providing for short ways of proceeding.

I am not sure whether we want to go into those things or not. My present impression is to be a little hesitant about it. In fact, I am

not sure that they change the situation very much, even in England. That is, there are several attempts under English procedure, definitely to shorten the pleading requirements that might occur in a complicated action.

MR. DONWORTH: Doesn't the statute that we have no connection with a case involving less than $3000, doesn't that throw some light on the problem?

MR. CLARK: I think it does, very much; and my present impression is not to go very far, if at all, in that direction; that is, have our rules quite general.

That is all I have.

MR. TOLMAN: Dean Clark, have you considered the question of costs, in connection with enforcing discipline, and control in regard to delays and fictitious defenses, on the losing party? Have you considered that as a part of the scope of the rules?

MR. CLARK: Yes, I should think so; and I should think certain provisions will come in. As a matter of fact, I don't believe they are awfully effective.

We have, for example, a provision in Connecticut for taxation of costs when the general

denial is used when it shouldn't be; and I don't believe a judge ever enforces it. But I am not sure but what it might be a good thing to have in. It looks as though --

MR. WICKERSHAM: The English judges do.

MR. CLARK: Yes. I don't suppose, though, we can change the American system of costs to the English system. The English system really makes costs mean something.

MR. DODGE: They are tremendously under attack now.

MR. LEMANN: May I ask, Mr. Chairman,has the Reporter any formative ideas, as to whether he is going to formulate an entire draft before the Committee meets again, or will it come to us in sections?

I was just wondering, in connection with the general program of the work of the Committee. I don't know whether he has been able to think that out.

MR. CLARK: Well, I don't know that I can answer that specifically. I should put it this way, that I was planning now to get a definite draft of the main features at least, if not all; possibly all,

but the main features, perhaps leaving for further consideration Discovery and these matters, by the early fall, for our meeting. Whether I can get anything prior to that to have your comment on, whether you want it that way or not, I don't know. I will be glad to have your suggestions, and I am willing to try to do it. I don't think I can get it until around the first of September, anyway. It might be just as well to try to get it to you in more complete form for the meeting in October.

MR. LEMANN: I should think we would generally prefer to have it all before us, if that is agreeable.

MR. DOBIE: You didn't contemplate any more meetings until fall?

THE CHAIRMAN: No, not until the Drafting Committee has got something for us to go over.

MR. DONWORTH: In regard to the motion adopted this morning as to our proceedings not being given out to the public, I would like an expression on this:

When we get a tentative draft from the Reporter, to what extent can we discuss that

with members of the Bar and others?

Shouldn't we have that privilege?

THE CHAIRMAN: I don't see how we can avoid it. About all we can do is when you consult people or confer with them, is to caution them and say the documents are not for publication. I think we tie ourselves down too much, and exclude too much in the way of good suggestions, if we refuse to let anybody look at anything we do.

MR. DOBIE: Yes. I had no such idea, Judge, when I made that motion. It was my idea that we should not go out and say, "General Wickersham was in favor of this, that or the other, but the rest of the fellows didn't like it, and opposed it"; things of that kind.

I don't think there is any objection at all, on the tentative stuff.

MR. DONWORTH: I would like an expression from Dean Clark on that. My idea would be, when we get the first draft on that, I would like to discuss it with some of our lawyers and judges, and perhaps at a meeting of the State Bar Association Executive Committee, something of that kind.

Isn't that along the right line?

MR. CLARK: My impression is that there, too, we should follow the model of the American Law Institute. They mark their material "Confidential", which I suppose means that they can disown it; and then it is discussed quite freely.

MR. WICKERSHAM: Oh, yes. It simply means the Institute assumes no responsibility for the mere suggestion.

THE CHAIRMAN: I will ask the Chief Justice if he won't consent to our using material that way, marked "Confidential", with the understanding that it is not to be published; and then use it pretty generally in the way you suggest. I don't think he will offer any objection to it.

MR. WICKERSHAM: You get more help from suggestions based upon a definite text than you can in any other way; but we still come back to Judge Olney's original suggestion of having a general outline of what is going to be covered.

Dean Clark, I come back to the original suggestion which Judge Olney made, about having a general outline. Is it feasible to prepare that and send it before September?

MR. CLARK: Well, yes. What I really intended to do was to send you something next week.

MR. WICKERSHAM: That is all right.

MR. CLARK: It depends a little on that -- I intended to make a fair summary --

MR. WICKERSHAM: That is what Judge Olney had in mind.

MR. CLARK: I wouldn't want to go very far.

MR. WICKERSHAM: Oh, no. As I understand, you mean a general outline of what the Reporter has in mind?

MR. OLNEY: Yes, not the details, but the general subject; not merely the subject, but also the object that you intend to drive at with your draft.

MR. CLARK: Yes

MR. OLNEY: In that connection I had in mind, too, the situation so far as San Francisco is concerned. The Circuit Judge there has appointed a committee, either directly or indirectly, I don't know; but he has appointed a committee and he thinks he is responsible for it, and he is.

I had in mind, when I got this draft, this

outline, to see him, and also to see the Committee itself and submit it to them, and ask them if they had any suggestions to make in regard to it.

I don't know what work they have done, but my thought was to interest them in it, get them interested in the thing and working along that line, and making whatever suggestions they have to make.

MR. CLARK: I think that would be quite all right.

MR. OLNEY: It would be informal. That is what I had in mind to do.

MR. CLARK: Yes, I think that would be quite desirable.

THE CHAIRMAN: On the matter of your expenses of attendance at this meeting, the thing is in somewhat of a state of confusion. owing to the fact that we haven't any direct appropriation, and all money now available is available only through the Department of Justice.

Major Tolman suggests that if each one of you will send in a statement of your expenses to Mr. Hammond at the Department there, Mr. Hammond will take whatever steps are necessary and advisable to get such an allowance as the Government regulations permit, and try to relieve you of a lot of detail about expense accounts, and so on.

MR. HAMMOND: Edward H. Hammond, just "Department of Justice", will be all right.

MR. DONWORTH: I wonder if Mr. Hammond is prepared to rule on the question of whether we should charge $5.00 a day for meals, or the actual disbursements?

MR. OLNEY: I can advise you that you had better use the $5.00.

THE CHAIRMAN: Mr. Hammond suggests you had better send in your expense accounts; maybe he can get more than the regular per diem allowance. Under

some peculiar features of this appropriation, he may get more for you; so that the best way to do it is to put in your bill, and they will get whatever the law allows. That is about it, isn't it?

MR. HAMMOND: Yes. You are entitled to your traveling expenses, including a Pullman and anything like that. Then the ordinary employes of the Government are entitled to $5.00 a day; but we are going to try to enlarge upon that, if we can, to make a more liberal allowance.

If there is any way of fixing that amount, it would simplify things. If you gentlemen want $10.00 a day, I would appreciate your saying so. Then, everybody would be entitled to that amount. If it went a little bit over, you would lose; if it went a little under, you would gain; but they are very anxious to have some set amount.

So far as this particular meeting goes, just show your traveling expenses, whatever they were, including your Pullman, and your actual sustenance, and we will take care of it in that way. But I was thinking for the future meetings, if we could sort of agree on a per diem, and then add to that the traveling expenses, it would simplify the bookkeeping and everything else.

THE CHAIRMAN: Can't we leave that to the Attorney General and the Chief Justice, to do what they think is permissible and fair under the circumstances?

MR. HAMMOND: Well, I don't know as the Chief Justice would like to limit it, anyway. He would appreciate, I think, a suggestion from you as to what a reasonable per diem would be. We realize that $5.00 is not enough to cover expenses. That is the only thought I had. If we could get some expression from you --

THE CHAIRMAN: I should think we would be cheerful about $10.00, which is double the regular statutory allowance for ordinary Government employes, and twice what a United States Circuit Judge gets when he travels around.

MR. DONWORTH: To avoid the idea that there is any profit at all, I am inclined to think it ought to be the actual disbursements.

MR. LOFTIN: Mr. Chairman, I wanted to inquire about paying for our lunch today; nobody came around to collect for it --

THE CHAIRMAN: That was arranged for by Major Tolman.

MR. LOFTIN: If the Major can get it out of the Government, all right; but if he is paying it out of his own pocket, I don't think that is fair.

THE CHAIRMAN: How about that, Major?

MR. TOLMAN: I am directed to take care of that, and send in a voucher. I hope I will get it back.

THE CHAIRMAN: I think it is appropriate at this time to say that we are all indebted to Major Tolman for his help here, and his hospitality, and in making our arrangements.

Is there anything else you want to bring up?

MR. LEMANN: Will future meetings be held in Chicago?

THE CHAIRMAN: I will consult the members of the Committee as to their preferences, before calling other meetings; just the way I did last time. I consulted everybody by wire, and reached the best compromise I could on it.

MR. DONWORTH: Personally, it is just as agreeable to me to meet in New York or Chicago. Of course,

I know New York better, but Chicago is all right.

THE CHAIRMAN: Well, it may differ at different times, depending on the plans of the members. If you are willing, I will just wire you in advance every time and get your recommendations and convenience as to date and place, and then I will do the best I can to conform to the will of the largest number.

MR. WICKERSHAM: I think it would be a mistake if all our meetings are in New York. Much as I would prefer to have them there, I think it is better to have meetings here occasionally.

MR. DONWORTH: Or in Washington, perhaps?

MR. WICKERSHAM: Or in Washington.

MR. CLARK: I might say, the Association of American Law Schools is going to New Orleans just after Christmas. That is a nice place to go.

MR. TOLMAN: I was going to suggest that, some winter time, we might meet in New Orleans.

THE CHAIRMAN: Well, if there is no further business, we are ready to adjourn.

MR. OLNEY: I move that we adjourn, subject to the call of the Chairman.

MR. WICKERSHAM: Second the motion.

THE CHAIRMAN: The motion is carried.

(Thereupon, the first meeting of this Committee adjourned subject to the call of the Chairman.)
